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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 447

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 12, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. i-xiv) is not yet officially reported. The Board's Decision and Order (R. 35-36, 18-30)[1] are reported at 155 NLRB 1042.

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[1] "R." refers to "Volume I, Pleadings"; "Tr." refers to the stenographic transcript of the unfair practice hearing; "G.C. Exh." refers to exhibits of the NLRB's General Counsel; "U.Exh." refers to the Union's exhibits. These documents comprised the record in the court of appeals, and certified copies thereof have been filed with the petition.

JURISDICTION

The decree of the court of appeals (Pet. App. xv-xviii) was entered on May 9, 1967, and a petition for rehearing was denied on May 18, 1967. The petition for a writ of certiorari was filed on August 2, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that petitioner Union violated Section 8(b)(2) and (1)(A) of the Act, by refusing to dispatch employees to jobs as longshoremen and barring them from the dispatching hall because they engaged in a protest against the Union's dispatching procedures.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C to the petition, at pp. xix-xxii.

STATEMENT

A. The Facts

In 1961, the International Longshoremen's and Warehousemen's Union ("ILWU") and the Pacific Maritime Association ("PMA") entered into a five-year collective bargaining agreement providing, *inter alia*, for the dispatching of longshoremen to jobs through halls operated jointly by ILWU and PMA

(R. 20, 18; U. Exh. 2, pp. 1, 42, Tr. 7, 11). Under the terms of the agreement, grievances relating to the operation of the halls were to be adjusted by Joint Port Labor Relations Committees ("Joint Committees") composed of an equal number of ILWU and PMA representatives (R. 20; U.Exh. 2, pp. 43, 64). Petitioner Union ("Local 12") is the local affiliate of ILWU in the port of North Bend-Coos Bay, Oregon (R. 20; Tr. 166). Local 12 selects the dispatchers for the North Bend-Coos Bay hall and pays for one half of the hall's operating expenses. (R. 21; Tr. 35-37, 77, 101, 119, 167.)

Bernard Warnken, Donald Wilson and Lee Thomas worked in North Bend-Coos Bay port as "casual" longshoremen, that is, non-registered longshoremen who are dispatched to jobs when no registered longshoremen are available (R. 20; Tr. 15, 12). On August 18, 1964, Wilson and Bernard Warnken's brother Bill complained to Local 12 President Armstrong that the dispatchers at the local hall were discriminating against them by preferring sons of registered longshoremen (R. 21; Tr. 167, 101, 119, 77, 35-37). On the following day, Wilson and the Warnken brothers picketed the hall until Armstrong promised that the Coos Bay Joint Committee would meet with them at 7:30 p.m. on August 21. When they arrived at the designated time and place, however, no members of the Joint Committee appeared (R. 21; Tr. 101, 119, 97).

On August 29, Wilson and Bernard Warnken protested to a PMA representative on the Joint Committee and were told to file a written statement of

grievances with the Committee which they did later that day (R. 21; Tr. 43, 50, 84, 86, 103; G. E. Exh. 4). Their statement assailed the "unjust system" of favoring sons of registered longshoremen and complained that the method of selection used by the relief dispatcher, Joe Jakovac, made the casuals "feel * * * like a sheep being herded out to pasture" (R. 21; G.C. Exh. 4). On September 2, Wilson, Warnken and Thomas orally presented their grievances to the Joint Committee (R. 21; Tr. 77, 103, 138, 83). No action had been taken by September 26, when they complained to a PMA representative that the "situation * * * has gotten worse" in that they were being "froze out altogether," and suggested that they were about to take "further actions" (R. 21; G.C. Exh. 3, Tr. 78, 90, 138). The PMA representative asked them to "allay any unnecessary drastic action until our efforts have been expended * * *" (G.C. Exh. 5).

On October 5, 6, and 7, every casual at the hall was hired except Wilson, Warnken and Thomas. Additional casuals were even recruited from taverns and a nearby Air Force base (R. 21; Tr. 57, 105-108, 111). On October 8, in Union President Armstrong's presence, dispatcher Jakovac evicted Warnken, Wilson and Thomas from the hall, stating that "[t]his is a private hall and we've got the right to ask anyone to leave here that we don't want" (R. 21; Tr. 111, 125-126, 137, 170-173). The three men then left. When Thomas returned to the hall later that day, Jakovac told him to "get out and stay out" (R. 22; Tr. 127-138).

Wilson then protested to a PMA representative, who promised that they would hear from him on the following Tuesday, October 13. That Tuesday, the three men "waited all day [at Wilson's home] and never heard a word" (R. 23; Tr. 59-60). The following day, October 14, they resumed picketing the hall and continued to picket until October 20, when they filed an unfair labor practice charge with the Board (R. 21; G.C. Exh. 1(a), 60, 71-72, 113, 128). At a meeting of the Joint Committee on October 21, the charges came to the attention of the members, whereupon the employer representatives announced that they would have nothing further to do with the matter. The Committee made no disposition of the grievance. (R. 24; Tr. 72, 91, 140.)

Wilson, Warnken and Thomas did not enter the hall again until November 13, after a Board agent advised them that the Union had alleged that their expulsion from the hall was for one day only (R. 23; Tr. 122-123, 113, 128-129). Between that time and March 23, 1965, Warnken reported to the hall some 90 mornings without being dispatched to a single job (R. 23; Tr. 113-114, 104, 121, 60-61). Wilson reported for about 50 days without being dispatched, and finally obtained other employment on February 16, 1965 (R. 23; Tr. 60-64, 78-79, 51-52). Thomas reported regularly between November 13 and December 4 or 5 but received no work (R. 23; Tr. 130, 60-61). Other casuals, with earnings comparable to theirs during the first three quarters of 1964, continued to be referred to jobs at approximately the same rate during the final quarter of 1964 and the

first two months of 1965 (R. 23; G.C. Exh. 2, Tr. 14-15). With one exception, casuals were dispatched to work every weekly payroll period between September 29, 1964 and March 8, 1965 (G.C. Exh. 2).

B. The Decision of the Board and the Court of Appeals

Upon the foregoing facts, the Board found (R. 26-27, 29) that Local 12, through the conduct of the dispatchers, had violated Section 8(b)(2) and (1)(A) of the Act, by refusing to refer Warnken, Wilson and Thomas to available jobs and barring them from the hall because they had picketed and filed grievances to protest the dispatching procedures. The Board ordered the Union, *inter alia*, to cease and desist from the unfair labor practices found and to make the three employees whole for any loss of pay suffered by them as a result of its unlawful conduct (R. 29-31, 35-36).

The court of appeals sustained the Board's findings and enforced its order (Pet. App. i-xiv).

ARGUMENT

The decision of the court of appeals, which turns on its special facts, is correct and not in conflict with the decision of any other court of appeals. There is no occasion for further review.

1. It is well settled that a union violates Section 8(b)(2) and (1)(A) of the Act if, in the administration of an otherwise lawful hiring arrangement, it refuses to refer an applicant for employment in order to retaliate against him for challenging the union's

policies or the conduct of its agents. *Lummus Co.* v. *National Labor Relations Board*, 339 F. 2d 728, 734 (C.A. D.C.); *National Labor Relations Board* v. *Local 138, Operating Engineers*, 293 F. 2d 187, 193 (C.A. 2); *National Labor Relations Board* v. *H.K. Ferguson Co.*, 337 F. 2d 205, 207-208 (C.A. 5), certiorari denied, 380 U.S. 912. Petitioner Union's principal contentions (Pet. 8-11, 13-15), that Warnken, Wilson and Thomas were not denied any available employment and were only asked to leave the dispatch hall for causing a "disruption," merely raise "substantial evidence" questions, which do not warrant review by this Court. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 490-491; *National Labor Relations Board* v. *Pittsburgh Steamship Co.*, 340 U.S. 498, 502-503.

Moreover, petitioner's claim that the loss of work which these three men suffered resulted solely from their alleged disruption of activities in the union hall flies in the face of the record which shows that they had been denied work on the three days prior to the alleged disruption and that after they returned to the hall in November, 1964, they were totally excluded from work. The record amply supports the findings of the Board, sustained by the court of appeals, that this exclusion from employment was a direct result of "reprisals directed by the dispatcher against them * * * motivated by their concerted specific objections to the method of hiring * * *." (R. 27).[4]

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[4] Similarly unsupported is the Union's contention (Pet. 10-11) that it did not cause any employer to encourage union

2. There is no merit to petitioner's argument (Pet. 15-17), that the Board's order should be modified to expressly state that backpay liability must be determined on the basis of the actual number of days the employees would have been employed but for the discrimination. As the court below held (Pet. App. xiii), the Board's order already "contemplate[s] an inquiry into the length of time the employer would have kept the charging parties at work"; it provides (R. 29, 30) that the Union should make them whole "for any loss of pay suffered by them as a result of the [Union's] discrimination" and "payment shall be equal to the amount of wages they would have earned but for the discrimination practiced against them. . . ." *National Labor Relations Board* v. *Local 2, United Ass'n of Journeymen, etc.*, 360 F. 2d 428 (C.A. 2), is inapposite. There the Board required the union to make the employees whole for all loss of pay resulting from their lack of employment during a specific period coinciding with the union's discrimination, even though the employees had never "demonstrated their employability, since they were never put to work." *Id.*, at 434. Here the Board provided back

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membership by discrimination, within the meaning of Section 8(b)(2) of the Act. As the Board and court below held (R. 28, Pet. App. x-xi), the Union caused employer discrimination "through the simple expedient of not dispatching these men to any of the employers" and this tended "to encourage union membership in that it was designed to compel adherence to union policy in the operation of the hiring hall." See *Radio Officers' Union* v. *National Labor Relations Board*, 347 U.S. 17, 28-33, 39-42, 50-52. Nor was the Board, as the Union contends (Pet. 11-12), required to issue a complaint against the employers as well as the Union. *Id.*, at 53-54.

pay only for the period the casuals would have worked "but for the [Union's] discrimination * * * against them."

3. The Union cannot fairly urge (Pet. 17-20) that Wilson, Warnken and Thomas had no protected right to "picket in protest against an employer's hiring policy in the face of a grievance procedure through which such issues could be raised." For, as the Board and court below found (R. 27, Pet. App. vi-x), the Union discriminated against the casuals not only because they picketed but also because they invoked the very grievance machinery upon which the Union now relies.[8] In any event, as the court of appeals further held (Pet. App. xiv), the Union raised no such objection before the Board (R. 32-34) and is thus precluded by Section 10(e) of the Act from doing so now. *Marshall Field & Co.* v. *National Labor Relations Board*, 318 U.S. 253, 255-256; *National Labor Relations Board* v. *Seven-Up Bottling Co.*, 344 U.S. 344, 350; *National Labor Relations Board* v. *International Union of Operating Engineers, Local 66*, 357 F. 2d 841, 846 (C.A. 3), and cases cited, n. 10.

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[8] *National Labor Relations Board* v. *Tanner Motor Livery*, 349 F. 2d 1 (C.A. 9), relied on by the Union (Pet. 15, 18, 20), is inapposite, since there the court simply remanded the case to the Board to determine whether an employer could discharge employees protesting his racially discriminatory hiring practices "when there is an established collective bargaining representative having a contract with the employer and the employees do not act or seek to act through that representative." *Id.*, at 3.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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